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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

DAVID S. KELLERMYER, Individually,
and KELLERMYER'S, INC.

Petitioner,

v.

BLUE FLAME GAS CORPORATION, and
TENNECO OIL COMPANY

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

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QUESTIONS PRESENTED

1. Must a federal court adjudicating a federal right of action which lacks a limitations period apply the statute of limitations of the state where it sits, when the cause of action arose entirely in another state, or should the court follow a different federal choice of law rule, such as the rule for borrowing substantive elements of state law for a federal cause of action?

2. Does the application of national policy to choose a limitations period for a federal right of action violate the Due Process Clause of the Fifth Amendment when the national policy is one that changes from time to time in response to the national economy?"

PARTIES TO THE PROCEEDING

The caption of the case in this Court contains the names of all parties.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

David S. Kellermyer, individually, and Kellermyer's, Inc., respectfully petition this Court for a writ of certiorari to the Temporary Emergency Court of Appeals of the United States to review the judgment and opinion of that court.

OPINION BELOW

The Opinion of the Temporary Emergency Court of Appeals, reported at 797 F.2d 983, is Appendix A, at page A-1, of this Petition. The Judgment (Order) is Appendix B at page A-8. The Order denying Petitioners' Motion for Rehearing is Appendix C at page A-9. The district court did not render an opinion.

JURISDICTION

The Opinion and Judgment of the Temporary Emergency Court of Appeals (TECA) were rendered on July 8, 1986. Petitioners' Motion for Rehearing was denied by TECA on August 26, 1986. This Court's jurisdiction is invoked under 12 U.S.C. Section 1904 note, ESA Section 21(g), and 28 U.S.C. Section 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Due Process Clause of the 5th Amendment to the United States Constitution which provides, in part:

> No person shall be . . . deprived of life, liberty, or property without due process of law . . .

This case also involves the purposes of the federal program under which Petitioners' right of action arose, set forth in the Emergency Petroleum Allocation Act of 1973 (EPAA), 15 U.S.C. § 751(b), in parts as follows:

> The purpose of this chapter is to grant to the President . . . temporary authority to deal with shortages of . . . refined petroleum products or dislocations in their national distribution system.

Section 753 of the EPAA provides, in part:

> (a)[T]he President shall promulgate a regulation providing for the mandatory allocation of . . . each refined petroleum product . . . produced in or imported into the United States.
>
> (b)(1) The regulation [promulgated by the President] under subsection (a) of this section, the maximum extent practicable, shall provide for—

* * * * *

> (D) presentation of an economically sound and competitive petroleum industry, including the priority needs to . . . preserve the competitive viability of . . . branded independent marketers;
>
> * * * * *
>
> (F) equitable distribution of . . . refined petroleum products among all regions and areas of the United States and sections of the petroleum industry, including . . . branded independent marketers . . .

A private right of action was created for violation of the regulations issued under the EPAA, by § 754(a)(1) which provided, in part:

> [S]ections 209 through 211 of the Economic Stabilization Act of 1970 (as in effect on November 27, 1973) shall apply to the regulation promulgated under section 753(a) of this Title . . . as if such regulation had been promulgated under the Economic Stabilization Act of 1970[.]

Section 210 of the Economic Stabilization Act of 1970 (ESA), 12 U.S.C. § 1904 note, provides:

> (a) Any person suffering legal wrong because of any act or practice arising out of this title, or any order or regulation issued pursuant thereto, may bring an action in a district court of the United States, without regard to the amount in controversy, for appropriate relief, including an action for a declaratory judgment, writ of injunction (subject to the limitations in section 211), and/or damages.

Section 760(g) of the EPAA provides, in part:

> [E]xpiration [of the President's authority to issue regulations] shall not affect any . . . civil . . . action or proceeding, whether or not pending, based upon any act committed or liability incurred prior to such expiration date.

STATEMENT OF THE CASE

Petitioners David S. Kellermyer (Kellermyer) and Kellermyer's, Inc., brought a federal cause of action on September 28, 1984, against Respondents to recover funds belonging to Petitioners, which funds were received and retained by Respondents in violation of the regulations issued by the Department of Energy (DOE) under the Emergency Petroleum Allocation Act of 1973 (EPAA), 15 U.S.C. § 751, *et seq.* The EPAA, § 753(a) (App. H, A-23) authorized the promulgation of regulations governing the petroleum industry, and § 754 (App. H, A-25) incorporated the Economic Stabilization Act of 1970 (ESA), 12 U.S.C. § 1904 note, § 210 (App. I, A-27) which provided for a private right of action to obtain appropriate relief from injuries caused by a violation of the regulations issued under § 753(a) of the EPAA ("210 action").

Petitioners' 210 action stated that it was for damages, and it was in the nature of a constructive trust as to funds retained by Respondent Blue Flame Gas Corporation (Blue Flame), a wholly-owned subsidiary of Respondent Tenneco Oil Co. (Tenneco) in sales governed by the national energy program established by the EPAA. The national energy program was implemented through regulations issued by the DOE under authority granted to the President in the EPAA §§ 751(b) and 753(a) (App. H, A-23 and A-24) and delegated by the President to the agency under § 754(b) (App. H, A-26), shortly after the inception of the program in 1973.[1] By the design of the federal energy program, national policy was changed from time to time as the national economy responded to the program, and, on January 28, 1981, President Reagan exercised his authority directly by revoking all regulations, eight days after his inauguration. The EPAA § 760(g), expressly provides that the expiration of the President's authority "shall not affect" any civil action, whether or not pending, based on any act committed or liability incurred prior to such expiration date. (App. H, A-26.)

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[1] The President originally delegated his authority to make regulations to the Federal Energy Administration, and the DOE succeeded to that regulatory authority when it was created on October 1, 1977. References to the agencies will be to the "DOE."

However, the EPAA and the regulations are not at issue in this case, nor are the changes in national energy policy. The issues presented arise from the dismissal of Petitioners' action based on the application of the Texas statute of limitations to Petitioners' right of action, and from TECA's affirmation of that "forum state rule" on two expressed grounds: (1) TECA said that because the EPAA and the ESA lack a limitations period, the district court was required to apply the statute of limitations of the forum state provided it did not frustrate the purposes of the EPAA; and (2) TECA also said that because the national energy policy that existed at the time the case was heard below was a policy to "wind up" the regulation of the petroleum industry and, therefore, the four-year statute of limitations of the forum state, Texas (App. K, A-30), was appropriate, while the fifteen-year statute of limitations of the state with the most significant contacts, Indiana (App. J, A-28), was inappropriately long.

Petitioner Kellermyer was a "branded independent marketer" of "Blue Flame" brand liquefied petroleum gas (LPG), EPAA § 752 (App. H, A-23), in and around the town of Defiance in northwest Ohio from October 1, 1974, until he incorporated his business as Kellermyer's, Inc., in June 1977. Petitioner Kellermyer continued to operate the same business after its incorporation.

Respondents supplied LPG to Petitioners under a written, form contract for marketing and distribution (App. L, A-31), prepared by Respondents and executed at Blue Flame's principal office in Bluffton, Indiana, about 50 miles west of Defiance.[2] The contract expressly provided that, "All conditions are set forth in this agreement, and this agreement shall be construed in accordance with the laws of the State of Indiana." Because LPG was a refined petroleum product, the parties' business was also governed to an extent by the DOE petroleum regulations at 10 C.F.R., Parts 210, 211 and 212, promulgated under the EPAA.

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[2] The relevant provisions of the contract required Blue Flame to supply LPG to Kellermyer on consignment and to pay certain commissions for the volumes sold and delivered by Kellermyer. The title to the LPG remained with Blue Flame until its sale to ultimate end users, and Kellermyer was required to guarantee payment of the purchase price to Blue Flame. The contract required Kellermyer to use his best efforts to promote the sale of Blue Flame's LPG and to distribute it in and around Defiance, within a 30-mile radius. The contract also required that Kellermyer furnish all necessary labor and tank trucks for delivery of LPG in bulk to customers and to pay all operating expenses for delivery.

One count of the Petitioners' action arose by May 1977, based on Respondents' retention of certain non-product costs incurred by Petitioners which the regulations allowed Respondents to recover in the price charged to the purchasers. Petitioners, and not Respondents, actually incurred the non-product costs in delivering the LPG to its customers. Petitioners made demands on Respondents for their share of the cost recovery, and Petitioners also complained to the DOE. Subsequent to Petitioners' direct demands and complaints to the DOE, Respondents gave Petitioners notice of termination of supply to be effective October 1, 1977, under the termination provision of the contract. In response to Respondents' notice of termination, Petitioners requested and received a formal interpretation by the DOE on October 14, 1977, determining that Respondents could not legally implement the contract termination provision, because the DOE regulations required Respondents to supply Petitioners.[3] (App. G, A-17.) Respondents never resumed supplies to Petitioners and began supplying Petitioners' customers directly. Respondents collected and retained the full sales price, including amounts to which Petitioners were entitled as commissions after their termination of Petitioners' supplies. Thus, Petitioners' federal cause of action for Respondents' violations of the regulations arose between May and October 1977.[4]

[3] Respondents did not seek judicial review of that DOE Interpretation and, therefore, there is no dispute as to its validity.

[4] Petitioners originally sought administrative relief from the DOE, and their efforts resulted in an enforcement action commenced in 1978 in which the DOE notified Respondents that it had made preliminary findings that Respondents had violated the regulations by refusing to supply Petitioners. During the pendency of the DOE enforcement proceeding, Petitioners continued to pursue their complaints before the agency. However, that and all other enforcement issues concerning Respondents were terminated when Respondents executed a Consent Order with the DOE in May 1981, and paid the agency $14,000,000 to create a fund for equitable relief for injured parties, without admitting any regulatory violations. The Consent Order Fund was intended to be distributed as equitably as possible, in a non-adjudicatory manner, to parties claiming injury from regulatory violations by Respondents.

On September 28, 1984, Petitioners filed the present action.[5] The district court below had jurisdiction under the ESA §§ 210 and 211, incorporated into the EPAA by § 754, creating a federal right of action for appropriate relief for any person injured by a violation of regulations issued under the EPAA, § 753, and providing for jurisdiction in the district court.

Respondents filed a motion to dismiss based on the four-year statue of limitations of Texas, asserting "a forum state rule" which, they argued, required a federal court to apply the forum state's statute of limitations in a federal cause of action without a Congressionally-mandated limitations period, so long as it did not frustrate the purpose of the statute that created the right of action. Respondents' motion did not dispute Petitioners' allegations that the lawsuit stated a federal cause of action, that the action arose in Indiana, and that the parties had expressly provided that the contract should be construed under Indiana law. Respondents also did not allege any factual relationship between Petitioners' action and the State of Texas and none appears in the record below. Their motion simply argued the forum state rule. Petitioners opposed the motion to dismiss on the grounds that if any state's statute of limitations should be borrowed, it should be the Indiana statute because Indiana was the state with the most significant relationship to the federal right of action that they were asserting.

In a preliminary order, the district court found that a conflict of law problem had been raised with regard to which state law applied, Indiana or Texas, in determining the statute of limitations issue. That order required that the Petitioners submit a legal

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[5] In December 1978, Petitioners had filed a suit against Respondents in the United States District Court for the Northern District of Indiana, asserting essentially the same claims stated in the action below. However, in January 1983, Petitioners agreed to Respondents' request for the stipulated dismissal of that action, without prejudice, "to allow Plaintiffs to pursue administrative remedies through the Department of Energy." Petitioners then applied for relief from the Consent Order Fund that Respondents had paid into the DOE, and the agency granted a payment which represented a very small part of Petitioners' injuries, and which did not preclude their private 210 action below.

memorandum addressing that issue, and permitted the Respondents to respond (App. E, A-11). Petitioners' memorandum in response to the district court's order argued that because Petitioners were asserting a federally-created cause of action, the choice of law was a federal question, *Citronelle-Mobile Gathering, Inc. v. Edwards*, 669 F.2d 717 (Temp. Emer. Ct. App. 1982), *cert. denied*, 459 U.S. 877 (1982), and federal law should choose to borrow Indiana's law for the reasons previously stated. Petitioners argued that the appropriate federal choice of law rule concerning limitations in a federal action should be the general federal rule that applies the most significant relationship test when borrowing substantive elements for a federal cause of action when federal law is silent. Petitioner argued that Texas could not be considered in making the choice because no relevant facts had occurred in Texas and, therefore, Texas had no relationship whatsoever with the action. In the district court, Respondents did not dispute Petitioners' assertion that the most significant contacts occurred in Indiana, nor did they dispute the fact that the contract contained a choice of law clause choosing Indiana law.

The district court granted Respondents' motion to dismiss (App. D, A-10), finding that the Texas four-year statute of limitations applied to bar the action because the court was sitting in Texas. (App. F, A-12.)

On appeal, Respondents still relied only on their assertion that the forum state rule applied. TECA affirmed the district court stating that, while the most significant relationship test applies in federal actions in regard to substantive issues, the application of a statute of limitation is considered to be a purely procedural matter, and, thus, the general rule is that the law of the forum state should be applied. TECA further stated that the forum state's statute of limitations is normally applied in a legal cause of action, such as Petitioners',[6] but that the court must scrutinize the

[6] ESA § 210 expressly provides that an injured party "may bring an action ... for appropriate relief, including an action for declaratory judgment, writ of injunction ... and/or damages." Petitioners contended below that, because their 210 action sought equitable relief in the nature of a constructive trust, TECA should decline to apply the forum state's statute of limitations, as it had declined to do in *Citronelle, supra*, which was also an equitable action. However, TECA found that Petitioners' action was "legal" and not "equitable," because ESA § 210 provides a "legal" cause of action for damages. TECA said that *Citronelle* was "equitable" because it was a DOE enforcement action under ESA § 209, but § 210 is clearly not limited to "legal" actions.

applicable state statutory limitation period when the cause of action is based on a federal statute to assure that the federal statute's purposes would not be frustrated either because the limitations period is too long or too short. TECA referred to national policy in favor of winding up regulation of the oil industry and, therefore, found that the Texa four-year statute, rather than the Indiana fifteen-year statute, was the applicable state statute of limitations.[7]

REASONS FOR GRANTING THE WRIT

This Petition for Writ of Certiorari should be granted because it involves an important question concerning borrowing a statute of limitations from state law for a federal action which has not been, but which should be, decided by this Court (Rules of the Supreme Court, 17(c)). As an additional consideration, there is apparent conflict or confusion in circuit court decisions which approach this issue, but have not clearly decided it (Rules of the Supreme Court, 17(a)). The Petition for Writ of Certiorari should also be granted because the court of appeals opinion below has decided a federal question in a manner that so far departs from the accepted and usual standards of due process as to call for an exercise of this Court's power of supervision (Rules of the Supreme Court, 17(a)).

This Court has never decided the question of how a federal court should choose the applicable statute of limitations in a federal action which lacks its own limitations, when the action arose entirely in a state other than the forum state. In applying the forum state rule in the opinion below, TECA applied a principle of law which subjects Petitioners' federally-created right of action to the vagaries of the numerous statutes of limitation of the states. Instead of possessing a single federal right of action, which may be brought in any federal district court, the forum state rule would bar Petitioners' claims in the federal district courts sitting in Texas, but not those sitting in Indiana.

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[7] TECA also said that Indiana's fifteen-year statute of limitations would not be more appropriate, but would be more likely to frustrate statutory goals than the Texas four-year statute.

Presumably, Petitioners' action would be barred in several states, while not in others. The determining factors are the variously-written statutes of limitations of those states which, TECA acknowledges, are not written to serve federal interests. *Occidental Life Insurance v. EEOC,* 432 U.S. 355, 367, 97 S. Ct. 2447, 53 L. Ed.2d 402 (1977). Opinion below (App. A, A-4). Thus, the forum state rule that TECA applied below would create a diversity of limitations periods for Petitioners' federal action, because Respondents do business in several different states and may be sued in any one of them.[8] In addition, the Second and Ninth Circuits have issued opinions which appear to be in conflict with TECA's opinion, below.

The decision below not only abdicates the authority of a federal court to make a federal choice of law based on the particular federal right of action involved, but in choosing the Texas four-year statute of limitations, TECA applies a court-made policy that is in conflict with the national energy policy that existed in 1977, when Petitioners' right of action accrued. At that time, the energy crisis was one of the nation's highest priorities and led to the creation of the DOE itself on October 1, 1977, the day Respondents terminated Petitioners' supplies. A court-made policy based on the changing aspects of the national energy policy, should not be used to determine the applicable statute of limitations in Petitioners' federal right of action because Petitioners' action does not constitute regulation, because Petitioners

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[8] Ironically, Petitioners chose the Southern District of Texas in an attempt to minimize the expenses of litigation and, primarily, the expenses of discovery that would be conducted in Houston where Respondents' principal office is located and where the district court below sits. The 1917 decision of the Third Circuit in *Bluefields S.C. Co. v. United Fruit Co.,* 243 F. 1 (3d Cir. 1917) *cert. denied,* 248 U.S. 585, 39 S. Ct. 182, 63 L. Ed. 433 (1919), illustrates the forum-shopping effect of the forum state rule. Bluefields S.C. C. (Bluefields), brought an action against United Fruit Co. in a federal court siting in Louisiana for violation of the Sherman Act, and then moved the action to Pennsylvania to gain the advantage of the statute of limitations of the latter state. Louisiana's relevant statutory limitations period was one year, and Pennsylvania's was six years. The court's opinion expressly recognized Bluefields' motivation in moving its action to Pennsylvania, but did not criticize it. The court found that the Pennsylvania statute of limitations was applicable because Pennsylvania was the forum state. However, the court also found that the limitations period had begun to run more than six years prior to the bringing of the suit, and, therefore, the action was barred. *Bluefields,* at 20.

lack prior notice and because it is not fair to create a right of action which is subject to changing policies. Petitioners' competitive viability was a permanent priority set forth in the EPAA. Petitioners' action should not have been affected by the President's revocation of the regulations because the EPAA indicated a policy to that effect, and also because the wind up of regulation of the industry does not require courts to bar private actions for redress.

1. TECA's application of the forum state rule is not logical as a federal rule because the forum state has no significant relationship to Petitioners' action, and because it promotes non-uniformity in federally-created actions.

TECA seems to have relied on the principle of *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941), which stands for the rule that in determining which state's law governs in a diversity action, the federal court must apply the conflict of laws principles of the forum state. *Klaxon* involved state causes of action and represents a choice of law rule designed to promote uniformity within a particular state. *Klaxon*, at 496. However it should not apply to a federal cause of action such as the one below where the uniformity sought should be among all federal distict having jurisdiction regardless of the state in which the court is sitting.

In *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO v. Hoosier Cardinal Corporation*, 383 U.S. 696, 86 S. Ct. 1107, 16 L. Ed. 2d 192 (1966), this Court recognized the potential for the question which Petitioners now present. [9] There, this Court said

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[9] In *Cope v. Anderson*, 331 U.S. 461, 67 S. Ct. 1340, 91 L. Ed. 1602 (1946), this Court said: "Moreover, limitations on federally-created rights to sue have similarly been considered to be governed by the limitation law of the state where the crucial combination of events transpired. Seaboard Terminals Corporation v. Standard Oil Co. of New Jersey, D.C., 24 F. Supp. 1018, Id., 2d Cir., 104 F.2d 659; Bluefields S.S. Co. v. United Fruit Co., 3 Cir; 243 F. 19, See Campbell v. City of Haverhill, 155 U.S. 610, 15 S. Ct. 217, 39 L. Ed. 280; Chattanooga Foundry & Pipe Workers v. City of Atlanta, 203 U.S. 390, 397, 27 S. Ct. 65, 66, 52 L. Ed. 241." *Cope*, at 466. In spite of the foregoing statement, *Cope* applied the state's borrowing statute instead of a different federal rule, and, therefore, did not decide the question presented by Petitioners here.

that when no federal provision governs, the timeliness of a private action brought under § 301 of the Labor Management Relations Act is to be determined as a matter of federal law, by reference to the appropriate state statute of limitations.

In so doing, the *Hoosier Cardinal* opinion observed that the record indicated that Indiana was both the forum state and the state in which all operative events occurred. The Court noted that neither party had suggested that the limitations period of another state was relevant and, therefore, there was no occasion to consider whether such a choice of law should be made in accord with the principles of *Klaxon* or by operation of a different federal conflict of laws rule. *Hoosier Cardinal,* at 707, n.8. In making this observation, *Hoosier Cardinal* cites several cases which generally stand for the proposition that, when borrowing state law, a federal court should choose the state with the most significant relationship to the cause of action being adjudicated. *Hoosier Cardinal,* at 707, n.8.[10] Such a rule should choose the limitations period most closely related to the cause of action and, in sharp contrast to the forum state rule, could be applied

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[10] In *Richards v. U.S.,* 369 U.S. 1, 82 S.Ct. 585, 7 L. Ed.2d 492 (1962), this Court was presented with the question of what law a federal court should apply under the Federal Tort Claims Act when the negligent act occurs in one state and results in injury and death in another state. The *Richards* opinion holds that the "whole law" of the place where the negligent act occurs is the law to be applied to determine the government's liability.

In *De Sylva v. Ballentine,* 351 U.S. 570, 76 S. Ct. 974, 100 L. Ed. 1415 (1956), this Court held that issues of domestic relations that arise in a federally-created action are decided by reference to the state where the relationship was created. *De Sylva,* at 980.

In *Vanston Bondholders Protective Committee v. Green,* 329 U.S. 156, 67 S. Ct. 237, 91 L. Ed. 162 (1946), this Court rejected the proposition that a federal bankruptcy court should apply the law of the state where it sits regarding questions of the accrual of interest on certain securities. Instead, it said that a federal court should follow federal principles, and it upheld the application of the law of the place where the securities were signed and payable, i.e., where the security had been created. The concurring opinion in *Vanston Bondholders* said that the Constitutional requirement of uniformity on the subject of bankruptcies is a requirement of geographic uniformity throughout the extent of federal jurisdiction, and "is wholly satisfied when existing obligations of a

uniformly throughout the federal court system.[11]

While this Court has never decided the question suggested by *Hoosier Cardinal*, at 707, n.8, it should now decide it, because the principle announced in *Klaxon* for diversity cases was never intended to make federal courts subservient to and dependent on the law of the state where they sit when adjudicating federally-created rights. *See DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 103 S. Ct. 2281, 76 L. Ed.2d 476 (1983), at 2282-83; *Wilson v. Garcia*, 471 U.S. 261, 105 S. Ct. 1938, 85 L. Ed.2d 254 (1985). In fact, this Court has held that federal courts have a basic responsibility to do "interstitial federal law-making" by borrowing to fill in the inevitable incompleteness presented by all legislation. *DelCostello*, at 2283, n.12. *DelCostello* said that the choice of a limitations period for a federal cause of action is itself a question of federal law. *DelCostello*, at 2283.[12]

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debtor are treated alike by the bankruptcy administration throughout the country regardless of the state in which the bankruptcy court sits." *Vanston Bondholders*, at 172.

In *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 62 S. Ct. 676, 86 L. Ed. 956 (1942), this Court upheld the holdings of both the district court and the circuit court rejecting the application of the principle of *Klaxon*. In *D'Oench*, the petitioner contended that the rule of *Klaxon* required a federal court sitting in Missouri to apply Missouri's conflict of laws rules. This Court said that it did not even have to decide whether *Klaxon* applied to a non-diversity action, because the liability of petitioner and the jurisdiction of the federal court were federal and not state questions. *D'Oench*, at 456.

[11] In *Clearfield Trust Co. v. U.S.*, 318 U.S. 363 (1943), this Court recognized that when federal courts borrow state law in a case in which the relevant transaction involves several states, the application of state law would lead to great diversity. In *Clearfield*, the court was addressing facts which would recur frequently in the several states, making identical transactions subject to the vagaries of the laws of the several states.

[12] This Court has held that state statutes of limitations would not apply to federal equitable actions because federal principles of equity are hostile to the mechanical rules of such satutes. *Holmberg v. Armbrecht*, 327 U.S. 392, 66 S. Ct. 582, 90 L. Ed. 743 (1946).

Below, TECA was following the forum state rule, which is essentially the same as the rule of diversity jurisdiction set forth in *Klaxon*. In choosing the shorter forum state statute of limitations, of the two put forth by the parties, TECA did not consider that a federal choice of law rule was applicable. However, TECA had articulated a different rule in two previous cases, and, thus, its recent decisions are conflicting. The only consistency is that it chooses the shorter period of limitations in each decision.

In 1981, TECA endorsed the "most significant relationship" test. It upheld the dismissal of plaintiff's 210 action due to the bar of limitations, saying that the Colorado district court correctly relied on the controlling case of *Ashland Oil Company of California v. Union Oil Company of California*, 567 F.2d 984 (Temp. Emer. Ct. App. 1977), *cert. denied*, 435 U.S. 994, 98 S. Ct. 1644, 56 L. Ed.2d 83 (1978), by holding that since all transactions were in Colorado, the two-year Colorado statute applied. *Colorado Petroleum Products Co. v. Husky Oil Co.*, 646 F.2d 555 (Temp. Emer. Ct. App. 1981).

In 1984, when TECA addressed the question of whether to apply the statute of limitations of Oregon, the forum state, or Washington, where most of the significant events occurred in a 210 action, it cited *Ashland Oil, supra*, and *Colorado Petroleum, supra*, for the applicable rule and it "held" that Washington had the most significant relationship to the controversy, but it also said that Oregon's borrowing statute applied.[13] *Gulf Oil Corporation v. Dyke*, 734 F.2d 797 (Temp. Emer. Ct. App. 1984), *cert. denied, Dyke v. Gulf Oil Corp.*, 53 U.S.L.W. 3239, 83 L. Ed.2d 108 (1984).

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[13] The district court had apparently rejected the use of the Oregon borrowing statue and, instead, applied Oregon's general choice of law standards to find that Washington, where the cause of action arose, had no true interest in the controversy. TECA said that it disagreed and expressly held that as between Washington and Oregon, Washington had the more significant relationship to the controversy. However, TECA then returned to the *Klaxon* rationale and said that Oregon's borrowing statute was applicable, and for that reason, the shorter Washington statute of limitations should apply. *Gulf Oil*, at 808. TECA added that, contrary to the district court's finding, the Washington two-year statute was not inconsistent with federal policy, because, as TECA repeated below, the national energy policy is to wind up regulation of the oil industry, citing *Johnson Oil Co. v. DOE*, 690 F.2d 191, 196 (Temp. Emer. Ct. App. 1982); *Ashland Oil Co., supra;* and *Siegel Oil Co. v. Gulf Oil Corp.*, 701 F.2d 149, 152 (Temp. Emer. Ct. App. 1983).

It was not clear that TECA was applying one or the other rule in *Gulf Oil.* However, in the case below, it was clear that TECA did not attribute any significance to the place where the cause of action arose, or the law that the Petitioners and Respondents had contractually chosen. TECA applied the forum state rule below even though there was not a suggestion that the forum had an contact with, or interest in, the right of action Petitioners asserted. Consequently, this case presents a clear example of the important question contemplated by this Court in *Hoosier Cardinal,* at 707, n.8, of whether to follow a federal choice of law rule that was different from the principle in *Klaxon.* This Court should decide the question presented here by departing from that principle and establishing that limitations should be borrowed by following the federal borrowing rule for substantive law.

The forum state rule which was applied by TECA has been widely criticized by legal commentators, especially in recent times. *Heavner v. Uniroyal Tire, Inc.*, 63 N.J. 130, 305 A.2d 412, 405 (N.J. 1972). In *Heavner,* the New Jersey Supreme Court reviewed the choice of law question regarding the application of either New Jersey's or North Carolina's statute of limitations in an action in which a North Carolina resident, who had purchased and mounted an allegedly defective tire in North Carolina, thereafter suffered injury in an automobile accident in North Carolina, but sued the tire company in New Jersey, its corporate home. The *Heavner* court analyzed both cases applying judicially-created doctrines whose purpose is to escape the mechanical rule, used by TECA below, and cases in which courts frankly rejected the mechanical rule.[14] *See Seymour v. Parke, Davis & Co.*, 294 F. Supp. 1257 (D.N.H. 1969), *aff'd with opinion* at 423 F.2d 584 (1st Cir. 1970); *see also Air Products and Chemicals, Inc. v. Fairbanks Morse, Inc.*, 58 Wis.2d 193, 206 N.W.2d 414 (Wisc. 1973). Interestingly, in the *Seymour* and *Heavner* decisions, the causes of action arose entirely outside of the forum state.

Heavner suggests that the doctrine that application of a statute of limitation is a procedural matter because it affects only a

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[14] The *Heavner* court concluded that a mechanical rule regarding selection of the forum state's statute of limitations must be rejected.

remedy and not a right, and is therefore controlled by the law of the forum, does not make good sense. *Heavner*, at 415. The court said that, "A right for which the legal remedy is barred is not much of a right. It would have made better logic if the limitations rule of the state whose substantive law is chosen to govern the right were deemed substantive also, so that both the original and the terminal existence of the right would be related to the same body of law." *Id.*, at 416.

Petitioners' suggestion that the Indiana limitation law applies here is buttressed by the parties' choice of Indiana law in their contract. Texas law specifies that the parties are free to contract for the application of non-Texas law, unless the same would be violative of public policy. If the parties agree that the contract is to be governed by the law of a particular stae, then that intention prevails in both Texas, *Austin Bldg. Co. v. National Union Fire Ins. Co.*, 432 S.W.2d 697 (Tex. 1968); *Woods-Tucker Leasing Corp. v. Hutcheson-Ingram Development Co.*, 642 F.2d 744 (5th Cir. 1981) (applying Texas law) and Indiana. *Barnes Group, Inc. v. O'Brien*, 591 F. Supp. 454 (N.D.Ind. 1984).

It cannot be suggested that the parties' selection of Indiana violates public policy of either state. See Tex. Jur.2d, *Conflict of Laws*, 10—"Effect of Public Policy;" See also, *Barnes Group*, at 459. Such a preference is in and of itself an expression of choice of law. *Austin Bldg., supra; Barnes Group*, at 459. Here, the parties, for mutual consideration, elected to apply Indiana law (the law of Respondent Blue Flame's home office) to resolve questions of contract interpretation, evidencing the clear intent that choice of law disputes be predictably resolved.

TECA also justified its borrowing of the state statute of limitations on the grounds that because the statute of limitations is procedural, the applicable federal rule was to apply the forum state's law, and not the most significant relationship test. However, it is clear from the precedents cited by TECA that it considers the choice of limitations to be within the special and limited scope of its jurisdiction to hear appeals of actions "arising under" the ESA Sect. 210(b)(2) and the EPAA. *Texaco v. DOE*, 616 F.2d 1193 (Temp. Emer. Ct. Appl. 1979). The nature of the issue governs the determination of whether TECA has jurisdiction

rather than the nature of the case or controversy below. *MGPC, Inc. v. DOE*, 673 F.2d 1277 (Temp. Emer. Ct. App. 1982), *but see Marine Petroleum Co. v. Champlin Petroleum Co.*, 657 F.2d 1231 (Temp. Emer. Ct. App. 1980). If the choice of a limitations provision is an issue arising under the federal statute that created the substantive elements of the right of action, then the limitations element must be substantive. It would be inconsistent to treat the issue as one arising under the substantive statute for jurisdictional purposes, and then to treat it as a mere procedural matter when borrowing state law, i.e., making a federal choice of law.

TECA's attempt to characterize the issue presented below as a procedural one fails to address the real issue recognized by this Court in *Hoosier Cardinal*, which arises outside of the forum state, by applying a federal choice of law rule which is different from the rule of *Klaxon*, a diversity jurisdiction case.

The Second and Ninth Circuits have attempted to address the issue. In 1939, the Second Circuit upheld a district court decision applying the statute of limitations of a non-forum state, holding that there can only be one period of limitations for a single wrong. *Seaboard Terminals Corporation v. Standard Oil Co. of New Jersey*, 24 F. Supp. 1018 (D.N.Y. 1938), *aff'd*, 104 F.2d 659 (2d Cir. 1939). In that decision, the court reasoned that it should apply the statute of limitations of the state where the cause of action arose, and that the most reasonable place is where the most significant events occurred. *Seaboard*, at 660. However, the district court had decided *Seaboard* based on the law of the forum state, which borrowed the statute of limitations of the state where the action arose because it was shorter than the forum's. *Seaboard*, at 660. In 1981, the Ninth Circuit expressed the rule that the statute of limitations for a federally-created cause of action which does not provide its own limitations period is that of the state most connected with the action. *Ward v. Caulk*, 650 F.2d 1144 (9th Cir. 1981). However, in *Ward*, the forum state was also the state most connected to the action.

Any rule that would require a federal court to select the law of the state in which it sits obviously would be a "no choice" rule. Such a rule, which TECA followed below, is simply an application of the *Klaxon* principle. Of course, *Klaxon* intended to allow state law to apply because it was a diversity case, and the

principle applied there has no application to a federal question. Moreover, TECA's procedural characterization is inconsistent with the choice suggested in *Hoosier Cardinal,* and inconsistent with this Court's express characterization of limitations as substantive when borrowed to fill the needs of a federally-created cause of action. *DelCostello,* at 2288; *Holmberg v. Armbrecht,* 327 U.S. 392, 66 S. Ct. 582, 90 L. Ed. 743 (1946). Thus, the choice of rules presented is between the application of state limitations law in federal courts sitting within the state, and the application of federal choice of law rules. However, the application of state law is not a "choice of law" because the only reasoning underlying the application of the forum state, is based on a territorial accident. If there is no rationale for applying the law of Texas other than the absence of an applicable federal provision and the fact that the federal court sits within the jurisdictional territory of Texas, rather than another state's jurisdictional territory, than the rule is clearly not based on any positive *federal* reason. The right of a plaintiff to bring a federal action in a federal court that has jurisdiction over the parties should not be barred in some federal courts, but not in others, by accidents of territoriality that are inconsequential to the federal judicial system.

2. TECA applied a changing national policy to bar Petitioners' action and thereby denied Petitioners' due process of law under the Fifth Amendment of the United States Constitution.

Petitioners' due process rights under the Fifth Amendment to the U.S. Constitution are denied by TECA's rejection of Indiana's statute of limitations. Petitioners are entitled to adequate notice of the limitations that will bar their right of action. *See Ochoa v. Hernandez y Morales,* 230 U.S. 139, 57 L. Ed. 1427, 33 S. Ct. 1033 (1913); *Herrick v. Boquillas Land & Cattle Co.,* 200 U.S. 96, 50 L. Ed. 388, 26 S. Ct. 192 (1908); *United States Fidelity & C. Co. v. U.S.,* 209 U.S. 306, 52 L. Ed. 804, 28 S. Ct. 532 (1906).

TECA, in its decision, gave as a reason for rejecting the Indiana statute that it was likely to frustrate the national policy in favor of winding up the regulation of the petroleum industry. TECA said that a court must scrutinize a limitaion period in order to insure that by its use the purpose behind the federal cause of action would not be frustrated. TECA found that the

Texas four-year limitation would not frustrate national policy and was the appropriate choice of law. It was also an easy choice because it had already expired when TECA chose it. However, that choice violated Petitioners' rights to due process because the national policy to wind up regulatory activities was part of the changing policies of the national energy program. EPAA § 751, *et seq.*, especially § 760.

The EPAA, and the regulations issued thereunder, 10 C.F.R. Parts 210, 211 and 212, provided for economic regulation of the petroleum industry, including amendment of those regulations as the economy changed. Those changes in the economy included both (1) changes in response to events that were external to the regulatory program, such as the Arab oil boycott; and (2) changes in response to the regulatory program, itself. The regulatory policies changed with the economy until the regulations were eventually revoked in their entirety by President Reagan on January 28, 1981, eight days after his inauguration.

It is fundamentally unfair to abridge Petitioners' right of action which accrued in 1977 because of policies which changed by the design of the regulatory program, and which did not even exist when Petitioners' action accrued. TECA did not specifically identify the policy to wind up regulation of the industry, upon which it based its decision, but TECA was apparently referring to the President's termination of the regulations on January 28, 1981. However, the EPAA manifested a clear intent that the termination of the President's regulatory authority should not affect a civil action that arose from a violation that occurred prior to such termination, whether or not the civil action was pending at the time of termination. EPAA § 760(g). The provision clearly demonstrates the purpose of the statute to protect Petitioners' action from the changes that were contemplated in the national energy program, including decontrol.

Moreover, permanent policies were embodied in the EPAA which were intended to preserve the competitive viability of "branded independent marketers" of petroleum products, such as Petitioners. EPAA, § § 752, 753(b)(1)(D). Thus, Petitioners may also invoke national energy policy to argue that their cause of action should not have been subject to a statutory limitation that was chosen for its brevity. Petitioners' viability is precisely what was destroyed during the regulatory period, and the pro-

tection that the statute intended to give to Petitioners should not be ignored. At a minimum, Petitioners should be entitled to the usual limitations period based on federal, not state, choice of law principles.

The policy that TECA is applying to Petitioners' action is a court-made policy to wind up private rights of action by barring 210 litigation against the petroleum industry. Petitioners submit that it is not necessary to wind up private rights of action to advance any national policy, and further submit that TECA's policy to bar 210 actions violates the Due Process Clause of the Fifth Amendment in that it deprives Petitioners of property without notice, and it bears no reasonable relationship to any legitimate purpose of the EPAA.

Petitioners' private 210 action is not regulatory, but is an action based on a liability incurred by Respondents when the now-revoked regulations were in force. Like many lawsuits, it is simply an action to redress a past wrong and, as such, will require adjudication based on the EPAA and regulations promulgated under that statute. The adjudication of past occurrences which requires the application of statutes whose national priority has diminished, and regulations that have been revoked, is distinctly not a regulatory burden on the industry. Such litigation does require the industry, and Respondents in this case, to answer for their past actions which violated the laws and regulations when they were in effect. Petitioners' action is a very traditional one for redress. To apply the policy of winding up regulation would be illogical, unnecessary and unfair to Petitioners. Moreover, such a wind up of private rights of action would be a windfall to Respondents by eliminating a *bona fide* liability that they had incurred to Petitioners.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment of the Temporary Emergency Court of Appeals of the United States.

Respectfully submitted,

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APPENDIX

APPENDIX A

Temporary Emergency Court of Appeals of the United States

No. 5-120

DAVID S. KELLERMYER, and KELLERMYER'S, INC., APPELLANTS,

v.

BLUE FLAME GAS CORP., TENNECO OIL CO., APPELLEES.

On Appeal from the United States District Court for the Southern District of Texas, Houston Division

(District Court No. H-84-4004)

(Argued: May 15, 1986 Decided: July 8, 1986)

JACK P. CAOLO, Michael Caolo & Associates, Inc., Dallas, Texas; Ginger Lew, Stovall, Spradlin, Armstrong & Israel, Washington, D.C.; and Terrence William Ackert, Ackert & Wiser, Orlando, Florida, were on the brief for the Appellants.

LLOYD D. CUNNINGHAM, Reynolds, Allen & Cook, Houston, Texas; and Alfred B. Smith, Jr. and Allan Brain, Tenneco Oil Company, Houston, Texas, were on the brief for Appellees.

Before WILLIAM J. JAMESON, FRED DAUGHERTY, and WESLEY E. BROWN, Judges.

FRED DAUGHERTY, Judge.

The Appellants' cause of action in this case arises under Section 210 of the Economic Stabilization Act of 1970, 12 U.S.C. 1904 (ESA), as incorporated into the

Emergency Petroleum Allocation Act of 1973, 15 U.S.C. 751, *et seq.* (EPAA). In this appeal the Appellants allege error by the District Court in applying the four year Texas statute of limitations to their cause of action and in not finding that Defendants have waived limitations or were estopped to assert that Plaintiffs' action was untimely brought.

LIMITATIONS

Neither Section 210 of the ESA nor the EPAA provides for a specific limitations period. It is the general rule that in the absence of a limitations period in the federal statute in question, the courts will apply the most analogous state law of limitations. *DelCostello* v. *International Brotherhood of Teamsters, et al.*, 462 U.S. 151 (1983); *Ashland Oil Company of California* v. *Union Oil Company of California*, 567 F.2d 984 (TECA 1977), *cert. denied*, 435 U.S. 944 (1978); *Siegel Oil Company* v. *Gulf Oil Corporation*, 701 F.2d 149 (TECA 1983); *Colorado Petroleum Products Company* v. *Husky Oil Company*, 646 F.2d 555 (TECA 1981); *Gulf Oil Corporation* v. *Dyke*, 734 F.2d 797 (TECA), *cert. denied*, 105 S.Ct. 173 (1984).

The Appellants in this case contend, however, that first, the District Court should have applied the Indiana fifteen year statute of limitations rather than the Texas four year statute, and on appeal also take the alternative position that no state statute of limitations should be applied to their cause of action because it is equitable in nature; and Appellants should therefore be allowed to pursue their complaint in the absence of laches. The Appellants rely on the cases of *Holmberg* v. *Armbrecht*, 327 U.S. 392 (1946) and *Citronelle-Mobile Gathering, Inc.* v. *Edwards*, 669 F.2d 717 (TECA 1982), *cert. denied*, 459 U.S. 877 (1982) to support this proposition. The Appellants are correct in their assertion that the TECA Court in *Citronelle, supra*, refused to apply a state limitations

period to a Section 209 action for restitution. Restitution is considered to be an equitable cause of action, and "suits to enforce equitable rights created by federal law are not subject to state statutes of limitations." *Citronelle, supra,* at 721, quoting *Holmberg, supra.*

Though we accept the Appellants' reading of *Citronelle, supra,* we disagree that the case should be applied to the case at bar. The fundamental distinction between *Citronelle* and this case is that the Appellants' cause of action arises, as above stated, under Section 210, whereas *Citronelle* arose under Section 209. Section 210 does not speak in terms of restitution as does Section 209. On the contrary, Section 210 provides a cause of action for *damages.* It is beyond dispute that a suit for damages is legal, not equitable. Thus, a specific limitations period should be applied in this Section 210 case rather than the equitable doctrine of laches. The TECA cases arising under Section 210 support this proposition, in that the court has consistently applied a state's limitations period to the action in question. *Ashland Oil Company of California* v. *Union Oil Company of California, supra*; *Siegel* v. *Gulf, supra*; *Colorado Petroleum Products* v. *Husky, supra*; *Gulf Oil Corporation* v. *Dyke, supra.*

Because we have determined that the Appellants' cause of action is one at law rather than equity, we now must decide which state's statute of limitations should be applied. The Appellants contend that the District Court erred in applying the four year limitations period of Texas to their cause of action. They assert that the more appropriate statute is the fifteen year period provided by Indiana, in that Indiana had more contacts with this litigation than the forum state of Texas.[1] The Appel-

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[1] On October 1, 1974, Appellants had entered into a written contract with Appellees to market and distribute Appellees' products in and around Defiance, Ohio. One of the Appel-

lants claim that this "most significant relationship" test is the correct standard under both Texas law and the relevant TECA decisions. While this contention is correct in regard to *substantive* issues, the application of a statute of limitations is considered to be a *procedural* matter, and thus the general rule is that the law of the forum state should be applied.

Though in a legal cause of action it is normally appropriate to apply the forum state's statute of limitations, there is an important additional consideration when a federal statute is the basis for the cause of action. In such a case, the Court must scrutinize the limitation period in order to ensure that by its use the purpose behind the federal cause of action would not be frustrated either because the state limitations period is too long or too short. "State legislatures do not devise their limitations periods with national interests in mind, and it is the duty of the federal courts to assure that the importation of state law will not frustrate or interfere with the implementation of national policies . . . State limitations periods will not be borrowed if their application would be inconsistent with the underlying policies of the federal statute." *Occidental Life Insurance* v. *EEOC*, 432 U.S. 355, 367 (1977).

This Court has repeatedly stated that it is one of the goals of the national energy policy "to wind up regula-

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lants was an Ohio resident and the other an Ohio corporation. The contract was executed in Appellees' office in Indiana. On November 5, 1978, Appellants brought an action in the United States District Court for the Northern District of Indiana, alleging the same claims set forth in the instant case. A stipulation of dismissal was filed on January 17, 1983, to allow Appellants to pursue administrative remedies through the DOE. Pursuant to a consent order in an action instituted by the DOE, Appellees made a payment to the DOE for distribution to claimants as restitution for alleged violations by Appellees. Appellants pursued their claim and were granted $5,668.85, plus interest on March 10, 1983. On September 28, 1984, Appellants filed this action in Texas.

tion of the oil industry . . ." *Johnson Oil Co.* v. *DOE*, 690 F.2d 191 (TECA 1982) at 196. See also *Ashland, supra*; *Siegel, supra*. We believe that the four year statute applied by the District Court would not frustrate the national energy policy.[2] Plaintiffs' counsel acknowledged this in oral arguments before this Court. The Appellants' contention that a fifteen year statute of limitations would be more appropriate than a four year period is clearly erroneous. Such a lengthy period would be much more likely to frustrate the clearly expressed goals of the federal statute than would the more restrictive four year statute of Texas.

We affirm the District Court's application of the four year limitations statute of the forum state in this legal action brought under Secion 210.

WAIVER AND ESTOPPEL

The Appellants also contend that, regardless of which state's statute of limitations is applied, the limitations period should not be applied due to certain alleged conduct on the part of the Appellees. They allege that the Appellees should be found to have waived a statute of limitations, or should be estopped from asserting a statute of limitations against the Appellants. Although similar in result, waiver and estoppel are two distinct concepts and thus will be treated separately.

Waiver is commonly defined as the intentional or voluntary relinquishment of a known right. The Appellants claim that the Appellees waived the future application of a statute of limitations by implication in the stipulation

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[2] Appellants in this appeal do not question the four year statute being the most analogous of the Texas statutes of limitations or when it accrued nor do they claim the four year period of the statute has been tolled by fraudulent concealment or anything else that would allow tolling of the statute.

of dismissal without prejudice entered by the parties to voluntarily dismiss the previous Section 210 Indiana case involving the same parties. The Appellants assert that it was somehow understood that the Appellees had agreed thereby to waive the future application of a limitations period. But there is no such proviso in the stipulation of dismissal signed by the parties. Though a valid waiver would not necessarily require a written agreement, there must be clear proof that such an agreement was in fact reached. It has been stated that the facts and circumstances relied upon to prove such a claim must be unequivocal in character. 28 AMJur2d § 174. Aside from the stipulation of dismissal, Appellants have only come forward with the subjective impression on the part of their counsel in the Indiana case that the limitations period was being waived. But Appellees specifically deny any such waiver or even a discussion thereof. We therefore hold that, as a matter of law, the Appellants have failed to assert a waiver of the statute of limitations in the future by the Appellees by their reliance on the Indiana stipulation of dismissal and the subjective impression of their attorney in the Indiana case.

In the same vein, the Appellants argue that the Appellees should be estopped from asserting a statute of limitations against them in this case. The doctrine of estoppel would require that the Appellants were misled to their prejudice by the Appellees into dismissing the Indiana action when such a dismissal was not in fact necessary in order for the Appellants to pursue administrative remedies against the public fund obtained in a Section 209 proceeding. Appellants, however, did not come forward with anything to support an estoppel before the District Court. Appellees deny misleading Appellants in any way and point to their letter and verified application for a continuance, in both of which they only agree, regarding the Indiana stipulation of dismissal, that they will not oppose the timely appeal by Appel-

lants to the appropriate court of the final administrative action of DOE in the Subpart V proceeding—not eschew the defense of limitations in a future Section 210 action. Moreover, in arguments before this appellate court, counsel for the Appellants was asked directly if anyone representing the Appellees had advised the Appellants that dismissal of the Indiana Section 210 case was necessary in order for Appellants to pursue administrative action against the Section 209 public fund. Counsel for the Appellants responded in the negative. Therefore. we hold that Appellants as a matter of law have failed to support their claim of estoppel and such claim was properly denied.

AFFIRMED.

APPENDIX B

TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

No. 5-120

DAVID S. KELLERMYER, and
KELLERMYER'S, INC.,
Plaintiffs-Appellants,

v.

BLUE FLAME GAS CORP., and
TENNECO OIL CO.,
Defendants-Appellees.

Before: JAMESON, DAUGHERTY and BROWN, Judges.

JUDGMENT

This cause came on to be heard on the record of appeal from the United States District Court for the Southern District of Texas, Houston Division and was argued by counsel. In consideration whereof, it is

ORDERED that the judgment of the District Court is AFFIRMED.

FOR THE COURT:

DONNA M. BOLD, Clerk

By:
Sharon Bollinger
Deputy Clerk

July 8, 1986

(District Court Civil Action No. H-84-4004)

APPENDIX C

TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

No. 5-120

DAVID S. KELLERMYER, and
KELLERMYER'S, INC.,
Plaintiffs-Appellants,

v.

BLUE FLAME GAS CORP., and
TENNECO OIL CO.,
Defendants-Appellees.

Before: JAMESON, DAUGHERTY and BROWN, Judges.

ORDER

Upon consideration of Appellant's motion (petition) for rehearing, it is

ORDERED that said motion (petition) for rehearing is DENIED. The Court's mandate shall issue seven days from the date of this order—Tuesday, September 2, 1986.

FOR THE COURT:

DONNA M. BOLD, Clerk

By:
Cynthia Ann Dykes
Chief Deputy Clerk

August 26, 1986

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-84-4004

DAVID KELLERMYER AND
KELLERMYER, INCORPORATED,
Plaintiffs,

VS.

BLUE FLAME GAS CORPORATION
AND TENNECO OIL COMPANY,
Defendants.

ORDER OF DISMISSAL

CAME ON TO BE HEARD this 4th day of December, 1985, Defendants' Motion to Dismiss Pursuant to Rule 12(b), Federal Rules of Civil Procedure, and the Court having entertained said motion, authorities cited, and arguments of counsel, is of the opinion that Plaintiffs' claim is barred by the applicable statutes of limitations, and that Defendants' Motion should be granted. It is, therefore,

ORDERED, ADJUDGED, AND DECREED, that this cause be and the same hereby is, dismissed, with prejudice, with costs taxed to Plaintiffs.

SIGNED this 5th day of December, 1985.

_____
UNITED STATES DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DAVID S. KELLERMYER and
KELLERMYER's INCORPORATED)
)
V.) C.A. NO. H-84-4004
)
BLUE FLAME GAS CORPORATION)
TENNECO OIL COMPANY)

ORDER

Before the Court is the defendant's Motion to Dismiss. After prudent review, the Court has determined that a conflict of law problem has been raised with regard to which state law applies (Indiana or Texas) in determining the statute of limitations issue raised by defendant's Motion to Dismiss. While the defendant has addressed this issue in his legal memoranda, plaintiff has not fully addressed this issue. So that the Court may be advised as to the positions of both parties, it is hereby

ORDERED that plaintiff provide the Court with legal memoranda addressing the conflict of law issue by November 1, 1985. Moreover, should defendant wish to file an additional memoranda, it will be filed by November 1, 1985. It is further ORDERED that the conference scheduled for October 21, 1985 is cancelled and rescheduled for November 11, 1985 at 3:00 p.m.

SIGNED AND ENTERED at Houston, Texas, on this the 18th day of October, 1985.

_____

Carl O. Bue, Jr.
United States District Judge

APPENDIX F

TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

TECA DOCKET No. 5-120

DISTRICT COURT No. H-84-4004

DAVID S. KELLERMYER, and
KELLERMYER'S, INC.
Plaintiffs/ Appellants,

vs.

BLUE FLAME GAS CORP., and
TENNECO OIL CO.
Defendants/ Appellees.

APPELLANTS' FIRST AMENDED STATEMENT OF PROCEEDINGS

TO: Attorneys for Defendants/ Appellees

Lloyd R. Cunningham
REYNOLDS, ALLEN AND COOK, INC.
3300 Allied Bank Plaza
Houston, TX 77002

Alfred B. Smith, Jr.
TENNECO OIL CO.
P.O. Box 2411
Houston, TX 77001

No report was made of the proceedings at the Hearing on Defendants' Motion to Dismiss, held before the Honorable Judge Carl O. Bue, Jr., on December 4, 1985. Therefore, Plaintiffs herewith submit the following statement of the said proceedings, pursuant to TECA Rule 18(a) and Rule 10(c), Federal Rules of

Appellate Procedure, for inclusion in the Record on Appeal. This statement of proceedings includes arguments of counsel and rulings of the Court:

PROCEEDINGS

The Defendants' counsel argued first and set forth the same arguments as to fact and law that are contained in their written submission. Defendants' counsel argued primarily that Plaintiffs' action as a federal claim under the EPAA was barred by the Texas statute of limitations, which applied because this action is filed in a Court sitting in Texas. Defendants' counsel cited cases applying the forum state's statute of limitations. Defendants' counsel further argued that the Defendants did not agree to waive the statute of limitations, either expressly or by implication, in their Stipulation of Dismissal entered into in a previous judicial action between the parties in the United States District Court for the Northern District of Indiana. That action was filed by the same Plaintiffs against the same Defendants as appear in this proceeding, and was substantially the same as the present action.

Plaintiffs' counsel also set forth the same arguments of fact and law that are contained in their written submissions. Plaintiffs' counsel argued that if any statute of limitations applies, it is the limitations contained in the laws of the State of Indiana because the cause of action arose in Indiana, the contract upon which the claims are based was entered into and executed in Indiana, and that contract expressly provided that it was governed by the laws of Indiana. Plaintiffs' counsel argued that in an action which arises under federal statute, the Court does not automatically apply the statute of limitations of the state in which it is sitting, but looks to the law of the state where the facts occurred and the cause of action arose. Plaintiffs further argued that the Court should, as an initial inquiry, determine whether to apply the Federal Doctrine of Laches, without applying any state law of limitations, under the facts of this case which are set forth in the written submissions of the Plaintiffs and the Defendants. Plaintiffs' counsel argued that, even if the Federal Doctrine of Laches is not applied by the Court, the Court could not apply the

statute of limitations of Texas, because Texas has no significant contacts with the case nor interests to be protected, while Indiana was the site of all relevant occurrences, and the law of Indiana must be applied to the contractual relationship from which the dispute arises, the supplement applicable federal laws.

The Court stated that it found that the Texas statute of limitations applied because the Court was sitting in Texas. The Court requested that the parties address the issue of whether the Defendants had waived, or should be estopped from asserting, the statute of limitations by virtue of the Stipulation of Dismissal that was entered into by the parties in January, 1983, in the prior proceeding in the U.S. District Court for the Northern District of Indiana.

Plaintiffs' counsel argued that the affidavit of Plaintiffs' former counsel in that proceeding in Indiana, Stephen R. Snyder, sets forth his understanding that the Plaintiffs' action could be refiled at the conclusion of administrative proceedings in the U.S. Department of Energy (DOE) without regard to any statute of limitations. Plaintiffs' counsel argued that this affidavit raised a fact issue as to whether Defendants waived, or are estopped from asserting, the statute of limitations. Plaintiffs' counsel further argued that it would be manifestly unjust to apply a statute of limitations because the Stipulation for Dismissal expressly provided that the dismissal was tc allow the Plaintiffs to seek relief before the DOE. Plaintiffs' counsel argued, in summary, that the necessary implication of the Stipulation of Dismissal was to waive the statute of limitations because the Defendants benefited from the dismissal, in that Plaintiffs' counsel argued that if limitations were not waived by Defendants, then Plaintiffs received no consideration for the dismissal agreement.

Defendants' counsel argued that the Stipulation of Dismissal had no relevance to the statute of limitations because the parties did not expressly address limitations, which they should have done if that had been their intent. Defendants' counsel argued that absent an express waiver of the statute of limitations or of any right to refile their claims against Defendants in a judicial forum, the Plaintiffs were subject to the ordinary running of the statute of limitations.

The Court stated that it must find that the Texas statute of limitations applied because the Court is sitting in Texas, and, therefore, Plaintiffs' actions are barred and must be dismissed. The Court further stated Defendants had not waived their defense under the statute of limitations by virtue of the Stipulation of Dismissal in the U.S. District Court in Indiana.

Plaintiffs' counsel submitted that the Court's dismissal should be without prejudice.

The Court stated that the dismissal was with prejudice.

(end of proceedings)

The foregoing statement is prepared from the resolution of Jack P. Caolo, Plaintiffs' counsel.

Respectfully submitted,

JACK P. CAOLO
Attorney for Plaintiffs
3600 LTV Center LB 136
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TERRENCE WILLIAM ACKERT
Ackert & Wiser
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Orlando, FL 32802
(303) 843-0781

Approved:

Lloyd R. Cunningham, Esquire
REYNOLDS, ALLEN AND COOK
3300 Allied Bank Plaza
Houston, TX 77002

Approved:

The Honorable Carl O. Bue, Jr.
U.S. District Judge
Judge Presiding

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Appellants' First Amended Statement of Proceedings has been furnished to Lloyd R. Cunningham, Esquire, 3300 Allied Bank Plaza, Houston, Texas 77002 and Alfred B. Smith, Jr., Esquire, Tenneco Oil Co., P.O. Box 2511, Houston, Texas 77001, Attorneys for Defendants/Appellees, by Express Mail this 11th day of February, 1986.

LYNN M.K. PITTMAN

APPENDIX G

DEPARTMENT OF ENERGY
Washington, D.C. 20461

INTERPRETATION 1977-39

Oct 14

Mr. Dave Kellermyer
President & Manager
Kellermyer's Inc.
2111 Baltimore
Defiance, Ohio 43512

Dear Mr. Kellermyer:

Enclosed is an interpretation issued by the Department of Energy (DOE) pursuant to 10 CFR Part 205, Subpart F, in response to your request for interpretation to the Federal Energy Administration (FEA) dated August 31, 1977, concerning the definition of a wholesale purchaser-reseller as set forth in 10 CFR 211.51 of the Mandatory Petroleum Allocation Regulations.

This letter constitutes a legal interpretation of applicable regulations under the facts presented and does not take into account hardship which might result from application of such regulations as thus interpreted or other factors which might form the basis for a request for an exception under 10 CFR Part 205, Subpart D.

This Interpretation depends for its authority on the accuracy of the factual statement contained therein and may be relied upon only to the extent that the actual facts correspond to those upon which the Interpretation was based. (See 10 CFR Part 205, Subpart F).

As provided by 10 CFR 205.85(d), this Interpretation may be rescinded or modified at any time. Only the persons to whom this Interpretation is addressed and other persons served a copy by the DOE may rely upon it. Any person aggrieved by this Interpretation may file an appeal within 30 days.

Sincerely,

/s/ Eric J. Fygi
Acting General Counsel

Enclosure

INTERPRETATION 1977-39

To: Kellermyer's, Inc.

Date: October 14, 1977

Rules Interpreted: § 211.51, Ruling 1975-8

Code: GCW AI – Definition of Wholesale Purchaser-Reseller

FACTS

On October 1, 1974, Dave Kellermyer,[1] a sole proprietorship, entered into a "distributor agreement" with Blue Flame Gas Corporation ("Blue Flame"), a subsidiary of Tenneco Oil. In that agreement, Blue Flame agreed to supply liquefied petroleum gas (propane), an allocated product for the purposes of 10 CFR Part 211, Subpart D, to Kellermyer's on consignment. Kellermyer's as the consignee agreed to sell and deliver the propane to retail purchasers. Under this consignment arrangement, the title to the propane remains with Blue Flame until its sale to ultimate end users. The agreement further provides that Blue Flame is responsible for hauling and servicing bulk deliveries of propane to storage tanks which it leases to Dave Kellermyer. Kellermyer's receives the commissions specified in a Blue Flame commission schedule and additional funds to cover the painting and lettering of the bulk delivery trucks.

The October 1, 1974 agreement also requires Kellermyer's to use its best efforts to promote the sale of Blue Flame products in and around the City of Defiance, Ohio; to furnish all necessary labor and tank trucks for delivery of propane in bulk to customers; and to pay all operating expenses for delivery (including truck maintenance and depreciation, comprehensive automobile liability, fuel, expenses, workmen's compensation, unemployment taxes, payrolls, and other related costs.) However, Blue Flame is required to pay the taxes and insurance on the real property and retains the right to establish credit terms for the propane customers.

[1] During the base period, S. E. Knisely operated the business which Kellermyer subsequently purchased on October 1, 1974. However, the business name was changed from "Knisely's Gas and Appliance" to "Kellermyer's." On June 1, 1977, Dave Kellermyer incorporated his business and changed its named to "Kellermyer's, Inc.," and continued to operate the business of selling and delivering propane as president and manager of Kellermyer's, Inc.

Pursuant to the October 1, 1974 agreement, Kellermyer's has over the last three years solicited new customers in an effort to promote the sale of Blue Flame propane in and around Defiance, Ohio, subject to Blue Flame's approval of the contractual arrangements pertaining to these new propane customes.

Subject to certain stated conditions, the terms of the agreement between Blue Flame and Kellermyer's provide for an automatic extension on a year-to-year basis, unless terminated by either party through a written notice given sixty days prior to the annual renewal date. Effective October 1, 1977, Blue Flame delivered a timely notice of termination to Kellermyer.

ISSUE

Whether Kellermyer's, Inc., as the successor to the business of Dave Kellermyer, is a wholesale purchaser-reseller as defined in 10 CFR 211.51.

INTERPRETATION

It has been concluded that Kellermyer's, Inc., to the extent that it sells and distributes allocated products under the circumstances set forth above, qualifies as a wholesale purchaser-reseller as defined in 10 CFR 211.51 of the Mandatory Petroleum Regulations, as clarified by Ruling 1975-8.

Wholesale purchaser-reseller is defined in 10 CFR 211.51 as:

> any firm which purchases, receives through transfer, or otherwise obtains (as by consignment) an allocated product and resells or otherwise transfers it to other purchasers without substantially changing its form.

The use of the term "as by consignment" in the definition of wholesale purchaser-reseller was interpreted in Ruling 1975-8. In that Ruling, it was determined that firms which obtain and resell or otherwise transfer allocated products are not automatically excluded from the definition of wholesale purchaser-reseller solely on the ground that they fail to take legal title to the allocated product. Those consignees which have a substantial degree of operational independence in the conduct of their

business of transfer and sale of a supplier's products (rather than merely providing a distribution service between a supplier and the supplier's customers or functioning like an employee of the supplier) fully qualify as wholesale purchaser-resellers and are subject to the same benefits and obligations of the allocation program which apply to jobbers, who normally take title to allocated products obtained for resale.

According to the Ruling, a consignee that qualifies as a wholesale purchaser-reseller will generally have most (but not necessarily all) of the following characteristics: (a) appropriate facilities and equipment for the conduct of the business of selling and distributing its supplier's product; (b) responsibility, independent of its supplier, for its internal financial management and physical and administrative operations; (c) responsibility to its supplier and others for expenses and liabilities arising from and connected with the business of transfer and sale of its supplier's products; and (d) independent control over the disposition of the allocated product, including the right to enter into and terminate relationships with customers rather than being restricted to distributing product solely to customers designated by the supplier. However, the Ruling further found that it was not essential for the consignee to have all four of these characteristics to qualify as a wholesale purchaser-reseller for the purposes of 10 CFR 211.51.

On behalf of its subsidiary Blue Flame, Tenneco argues that Kellermyer's does not qualify as a wholesale purchaser-reseller pursuant to the guidelines set forth in Ruling 1975-8. Tenneco specifically contends that Kellermyer's does not have the appropriate facilities and equipment for the conduct of its business or independent control over the disposition of the propane.

Tenneco's assertions ignore the basic premise of Ruling 1975-8. As stated previously, it is not essential for a wholesale purchaser-reseller to exhibit each and every one of the four characteristics set forth in Ruling 1975-8. The facts discussed above reveal that Kellermyer's is responsible for its own internal and financial management and is further responsible to its supplier and others for all expenses and liabilities arising from the sale of the propane to the retail customers.

In addition, Kellermyer's has appropriate facilities for the operation of the business and also exercises some degree of independent control over the disposition of the propane. As Tenneco has pointed out, Kellermyer's leases the equipment and facilities necessary for the operation of the business. Moreover, Kellermyer's also maintains some "independent control over the disposition of the allocated product" which Blue Flame supplies since Kellermyer's is obligated by the terms of the "Distributor Agreement" to "build up" the business of the supplier within a designated territory. Dave Kellermyer has complied with this particular provision of the agreement and has solicited new customers through his own efforts. Furthermore, Kellermyer's can, when good cause exists, unilaterally terminate existing business with customers. Kellermyer's therefore maintains independent control over the disposition of the propane and may deliver products to customers other than those selected solely by Blue Flame.

Thus, Kellermyer's retains a substantial measure of functional autonomy in distributing and selling Blue Flame Gas Corporation products under the terms of the "Distributor Agreement." Although it must account fully to Blue Flame for all products and sales revenues received, and must sell the product at prices authorized by Blue Flame, Kellermyer's is fully responsible for all aspects of conducting its business and is expected to exercise independent judgment and discretion in its operation. Moreover, although Blue Flame requires Kellermyer's to sell the products under Blue Flame's brands and trademarks, it bears no expenses under the "Distributor Agreement" for the costs of labor, employee benefits, or necessary insurance, and implicitly recognizes the distributorship as an independent business. Accordingly, it must be concluded that Dave Kellermyer is a wholesale purchaser-reseller as defined in 10 CFR 211.51, and as clarified in Ruling 1975-8.

Aside from the issue concerning Dave Kellermyer's status, Tenneco has raised a further point dealing with the contractual standing of the parties involved. It is Tenneco's position that Kellermyer's, Inc. is a separate and distinct entity from Dave Kellermyer and therefore lacks standing to assert the existence of a contractual relaionship with Blue Flame. As set forth in 10 CFR 211.9, each supplier of an allocated product is required to

supply those wholesale purchaser-resellers which purchased or obtained that product from that supplier during the base period. Accordingly, a wholesale purchaser-reseller which incorporates while continuing to maintain an on-going business retains its right to an allocation. See, *Chevron Oil Company*, 2 FEA Para. 80.531 (February 21, 1975). The right to receive such an allocation is treated as an integral part of the on-going business of the wholesale purchaser and thus is only deemed to be transferred when the entire business is transferred to a successor firm. 10 CFR 211.11(d). Such allocation can be terminated only in accordance with the provisions of 10 CFR 211.9(a)(2)(i). Although, as stated previously, during the base period the business was operated by S.E. Knisely, the transfer of the business to Dave Kellermyer resulted in a transfer of the allocation entitlement. Thus, Dave Kellermyer's incorporation to Kellermyer's, Inc. constitutes only a further change in the form of the business and not a termination of the business operation since Kellermyer continues to operate the business as president and manager of Kellermyer's, Inc. Consequently, Kellermyer's, Inc. as the successor to Kellermyer's, maintains the right to receive the base period allocation of propane as set forth in 10 CFR 211.9.

Kellermyer's also requested a determination concerning the appropriate price at which Blue Flame may sell the propane to the firm at such time as the contract between the two parties is terminated. The Mandatory Petroleum Price Regulations as set forth in 10 CFR Part 212 apply only to the sale or purchase of covered products. Since there is no actual sale of product by Blue Blame to Kellermyer's, Inc., there is no established product price between these parties for purposes of the price regulations. The price regulations in this case simply establish the maximum lawful prices the seller may charge in sales made through the distributor to the ultimate purchaser. See, *Rotary Gasoline Dealers*, Interpretation 1975-48, 42 FR 23751 (May 10, 1977). However, if Blue Flame, after the termination of the consignment agreement, provides propane to Kellermyer's on a sales basis, Blue Flame must place Kellermyer's in the proper class of purchaser, in accordance with Ruling 1975-2.

APPENDIX H

EMERGENCY PETROLEUM ALLOCATION ACT of 1973
15 U.S.C. §§ 751, 752, 753, 754, 760

§ 751. Congressional findings and declaration of purpose

(a) The Congress hereby determines that—

(1) shortages of . . . refined petroleum products . . . now exist or are imminent;

(2) such shortages have created or will create severe economic dislocations and hardships, including . . . closing of . . . businesses, . . . and

(3) such hardships and dislocations jeopardize the normal flow of commerce and constitute a national energy crisis which is a threat to the public health, safety, and welfare and can be averted or minimized most efficiently and effectively through prompt action by the Executive branch of Government.

(b) The purpose of this chapter is to grant to the President of the United States and direct him to exercise specific temporary authority to deal with shortages of . . . refined petroleum products or dislocations in their national distribution system. The authority granted under this chapter shall be exercised for the purpose of minimizing the adverse impacts of such shortages or dislocations on the American people and the domestic economy.

§ 752. Definitions

For purposes of this chapter:

(1) The term "branded independent marketer" means a person who is engaged in the marketing or distributing of refined petroleum products pursuant to—

> (A) an agreement or contract with a refiner . . . to use a trademark, trade name, service mark, or other identifying symbol or name owned by such refiner . . . or

(B) an agreement or contract under which any such person engaged in the marketing or distributing of refined petroleum products is granted authority to occupy premises owned, leased, or in any way controlled by a refiner . . .

but who is not affiliated with, controlled by, or under common control with any refiner (other than by means of a supply contract, or an agreement or contract described in subparagraph (A) or (B)) and who does not control such refiner.

§ 753. Mandatory allocation

[Authority to promulgate regulations covering crude oil, residual fuel oil, and refined petroleum products]

(a) Not later than fifteen days after November 27, 1973, the President shall promulgate a regulation providing for the mandatory allocation of . . . each refined petroleum product, in amounts specified in (or determined in a manner prescribed by) and at prices specified in (or determined in a manner prescribed by) such regulation. . . . Such regulation shall apply to all . . . refined petroleum products produced in or imported into the United States.

[Requisite areas of coverage for regulations; price regulations; unobtainability or curtailment of other fuels; limitations on pricing policy]

(A) protection of public health . . .

* * * * *

(B) maintenance of all public services . . .

* * * * *

(C) maintenance of agricultural operations, . . .

* * * * *

(D) preservation of an economically sound and competitive petroleum industry; including the priority needs to restore and foster competition in the producing, refining, distribution,

marketing, and petrochemical sectors of such industry, and to preserve the competitive viability of independent refiners, small refiners, nonbranded independent marketers, and branded independent marketers;

(E) the allocation of . . . crude oil to refineries . . .

* * * * *

(F) equitable distribution of crude oil, residual oil, and refined petroleum products at equitable prices among all regions and areas of the United States and sectors of the petroleum industry, including independent refiners, small refiners, nonbranded independent marketers, branded independent marketers, and among all users;

(G) allocation of residual fuel oil and refined petroleum products . . . for the maintenance of, exploration for, and production or extraction of—

(i) fuels, and

(ii) minerals essential to the requirements of the United States,

and for required transportation related thereto;

(H) economic efficiency; and

(I) minimization of economic distortion, inflexibility, and unnecessary interference with market mechanisms.

§ 754. Administration and enforcement; delegation of authority; civil and criminal penalties

(a)(1) . . . sections 209 through 211 of the Economic Stabilization Act of 1970 (as in effect on November 27, 1978) shall apply to the regulation promulgated under section 753(a) of this title, to any order under this chapter, as if such regulation had been promulgated, such order had been issued, or such action had been taken under the Economic Stabilization Act of 1970; . . .

* * * * *

(b) The President may delegate all or any portion of the authority granted to him under this chapter to such . . . agencies of the United States, . . . as he deems appropriate.

* * * * *

§ 760g. Conversion date of Presidential authority from mandatory to discretionary to promulgate, etc., regulation; termination date of Presidential authority limitations; expiration date of Presidential authority to promulgate, etc., regulation or issue order; effect on pending actions.

Notwithstanding any other provision of this chapter, at midnight on the conclusion of the 40th month in which the amendment under section 757(a) of this title is in effect, the President's authority to promulgate, make effective, and amend a regulation pursuant to section 753(a) of this title shall become discretionary rather than mandatory, and the limitations on the President's authority contained in sections 753(b)(2), 757 and 758 of this title shall terminate. The authority to promulgate and amend any regulation or to issue any order under this chapter shall expire at midnight September 30, 1981, but such expiration shall not affect any action or pending proceedings, administrative, civil, or criminal, not finally determined on such date, nor any administratie, civil, or criminal action or proceeding, whether or not pending, based upon any act committed or liability incurred prior to such expiration date.

APPENDIX I

ECONOMIC STABILIZATION ACT

12 U.S.C. § 1904

"§ 210. Suits for damages or other relief

"(a) Any person suffering legal wrong because of any act or practice arising out of this title, or any order or regulation issued pursuant thereto, may bring an action in a district court of the United States, without regard to the amount in controversy, for appropriate relief, including an action for a declaratory judgment, writ of injunction (subject to the limitations in section 211), and/or damages.

* * * * *

"§ 211. Judicial review

"(a) The district courts of the United States shall have exclusive original jurisdiction of cases or controversies arising under this title, or under regulations or orders issued thereunder, notwithstanding the amount in controversy;

* * * * *

"(b)(1) There is hereby created a court of the United States to be known as the Temporary Emergency Court of Appeals, . . .

* * * * *

"(2) . . . the Temporary Emergency Court of Appeals shall have exclusive jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under this title or under regulations or orders issued thereunder.

* * * * *

"(g) Within thirty days after entry of any judgment or order by the Temporary Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a United States court of appeals as provided in section 1254 of title 28, United States Code [section 1254 of Title 28].

* * * * *

APPENDIX J

EXCERPTS FROM INDIANA STATUTES, TITLE 34

34-1-2-1 [2-601]. Limitation of actions—Six-year statute.— The following actions shall be commenced within six [6] years after the cause of action has accrued, and not afterwards.

First. On accounts and contracts not in writing.

Second. For use, rents, and profits of real property.

Third. For injuries to property other than personal property, damages for any detention thereof, and for recovering possession of personal property.

Fourth. For relief against frauds. [Acts 1881 (Spec. Sess.), ch. 38, § 37, p. 240; 1951, ch. 301, § 1, p. 999.]

34-1-2-2 [2-602]. Limitation of actions—Two, five, six, ten and twenty years.— The following actions shall be commenced within the periods herein prescribed after the cause of action has accrued, and not afterwards.

First. For injuries to person or character, for injuries to personal property, and for a forfeiture of penalty given by statute, within two [2] years: Provided, That actions on account of injuries to personal property which occurred prior to the effective date of this amendatory act [March 7, 1951] shall be commenced within two [2] years from the effective date of this amendatory act.

Second. All actions against a sheriff, or other public officer, or against such officer and his sureties on a public bond, growing out of a liability incurred by doing an act in an official capacity, by the omission of an official duty, within five [5] years; but an action may be brought against the officer or his legal represenatives, for money collected in an official capacity, and not paid over, at any time within six [6] years.

Third. For the recovery of real property sold by executors, administrators, guardians or commissioners of a court, upon a judgment, specifically directing the sale of property sought to be recovered, brought by a party to the judgment, his heirs, or any persons claiming a title under a party, acquired after the date of the judgment, within five [5] years after the sale is confirmed.

Fifth. Upon promissory notes, bills of exchange and other written contracts for the payment of money hereafter executed, within ten [10] years: Provided, That all such contracts as have been heretofore executed may be enforced under this act, within such time only as they have to run, before being barred under the existing law limiting the commencement of actions, and not afterward.

Sixth. Upon contracts in writing other than those for the payment of money within twenty [20] years: Provided, however, That upon all mortgages other than mortgages defined and enumerated by Chapter 147 of the Acts of 1935, and upon deeds of trust, on judgments of courts of record and for the recovery of the possession of real estate, within ten [10] years: Provided, That as to all such mortgages and deeds of trust executed and judgments of courts of record and causes of action for the recovery of the possession of real estate accrued prior to the effective date of this amendatory act [March 7, 1951], the time in which actions shall be commenced thereon shall be the same as if this amendatory act had not become law. [Acts 1881 (Spec. Sess.), ch. 38, § 38, p. 240; 1951, ch. 301, § 2, p. 999.]

34-1-2-3 [2-603]. Actions not otherwise limited—Fifteen-year statute.—All actions not limited by any other statute shall be brought within fifteen [15] years. In special cases, where a different limitation is prescribed by statute, the provisions of this act shall not apply. [Acts 1881 (Spec. Sess.), ch. 38, § 39, p. 240.]

TEXAS STATUTE OF LIMITATIONS

Art. 5527. [5688] [3356] [3205] What actions barred in four years

There shall be commenced and prosecuted within four years after the cause of action shall have accrued, and not afterward, all actions or suits in court of the following description:

1. Actions for debt where the indebtedness is evidenced by or founded upon any contract in writing.

2. Actions for the penalty or for damages on the penal clause of a bond to convey real estate.

3. Actions by one partner against his co-partner for a settlement of the partnership accounts, or upon mutual and current accounts concerning the trade of merchandise between merchant and merchant, their factors or agents; and the cause of action shall be considered as having accrued on a cessation of the dealings in which they were interested together. Acts 1841, p. 163; P.D. 4604; G.L. vol. 2, p. 627.

APPENDIX L

DISTRIBUTOR AGREEMENT

THIS AGREEMENT made this 1st day of October, 1974, by and between BLUE FLAME GAS CORPORATION of Bluffton, Indiana hereinafter called "COMPANY", and DAVID KELLERMYER, whose address is 2111 BALTIMORE ST., DEFIANCE, OHIO hereinafter called "DISTRIBUTOR";

WITNESSETH:

WHEREAS, COMPANY is engaged in the marketing of liquefied petroleum gas and other petroleum products, and of accessories, tanks and fittings for the use thereof; and

WHEREAS, the DISTRIBUTOR contemplates purchasing two (2) truck chassis suitable for a 2,800 and 2,600 water gallon capacity tank for hauling liquefied petroleum gas, together with pump and metering equipment; and

WHEREAS, COMPANY is desirous of entering into this agreement for the purpose of engaging the DISTRIBUTOR to operate the busines of COMPANY located at Defiance, Ohio and known as KNISELY'S GAS AND APPLIANCE which business includes the delivery of liquefield petroleum gas to retail and wholesale accounts of COMPANY, and said DISTRIBUTOR shall also build up such business of COMPANY in and around the City of Defiance, Ohio, and within a RADIUS of 30 MILES THEREOF; and

WHEREAS, said DISTRIBUTOR agrees not to deal in any product competitive with the products of the COMPANY during the term of this agreement;

NOW, THEREFORE, in consideration of the mutual promises and covenants of the parties hereto, and the benefits to be derived by each of the parties, it is mutually agreed as follows:

* * * * *

20. It is agreed that there are no verbal understandings between the parties. All conditions are set forth in this agreement, and this agreement shall be construed in accordance with the laws of the State of Indiana. This agreement may not be changed orally, but only by an agreement in writing signed by COMPANY and DISTRIBUTOR.

21. The terms and provisions hereof shall be binding and obligatory upon the parties, their successors and assigned by the DISTRIBUTOR without the written consent of COMPANY, but COMPANY may assign said contract, or the benefits hereof to its affiliates or other parties.

IN WITNESS WHEREOF, the parties have hereunto affixed their hands and seal the date and year first above written.

BLUE FLAME GAS CORPORATION

_____ BY:_____

_____ BY:_____

Witness DISTRIBUTOR